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A MACRO APPROACH TO LARGE-SCALE CONSTRUCTION DEFECT MATTERS

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Introduction

Construction defect cases often bring with them a multitude of issues and parties. However, when the subject property is large and the defects are many, the issues and parties involved increase substantially. Below, we provide a macro-level approach to such large-scale construction defect matters, including who may be implicated and the inevitable coverage issues involved.

What are construction defects, exactly? It depends. In layman's terms, construction defects are those unexpected conditions of or damages to a property that cause the owners' additional expense to repair or cause the property to lose value. Common examples include cracked concrete, electrical malfunctions, or plumbing leaks. Severe cases include water intrusion or movement of the property.

For instance, look at the now-famous leaning tower in San Francisco, the Millennium Tower. This tower, completed in 2009, took about five years to build.¹ It is 60 stories tall and has 419 individual units and about 434 spaces of underground parking. It also cost about \$600 million to construct.² Unfortunately, the Millennium Tower is now sinking, and it has sunk about 16 inches into the earth and is tilting towards the northwest.³ According to recent satellite data, released by the European Space Agency, the tower is sinking at an exponential rate.⁴

However, the Millennium Tower is not the only concern. The ESA satellite data further demonstrated that the new Salesforce East tower, across the street from the Millennium Tower, was also sinking.⁵ Therefore, the city needs to be prepared to deal with the possibility that its other large buildings will also begin to sink.⁶

Potentially Responsible Parties

The owners of a home, condominium, or office suffering from construction defects will generally sue each and every potentially responsible party ("PRP"), in order to have the property repaired or to be compensated for repairs or loss of value.

Developers and/or general contractors are the first and obvious PRPs because they had the most control over the situation and were likely the sales contact. However, they likely relied on architects and engineers to construct the overall dimensions of the respective property and evaluate sub-base conditions. For instance, engineers would survey the soil and estimate the

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necessary depth, length, and width of pillars needed to support the building, to prevent any movement or sinking from groundwater or other soil conditions. Furthermore, architects would design, provide plans, and opine on the necessary materials, such as type, strength, width, length, to support the building and prevent it from shifting due to weather conditions or gravity. For structures like the Millennium Tower, the tower's massive height would be a great consideration.

Moreover, the developers and/or general contractors likely enlisted a host of subcontractors to construct the individual components of the property. Therefore, while less concerned, subcontractors are just as implicated.

From framing to painting, from plumbing to electrical, each subcontractor will likely be brought into the litigation until they prove that their work is unrelated to the cause of the construction defects. For those unable to prove with certainty that their work is unrelated to the alleged defects, the subcontractors will be required to undergo the heavy litigation and defend themselves against the owners in addition to the other PRPs.

The above PRPs are the first targets in any construction defect case, and they should be prepared to defend their work and opinions. In doing so, because these are complex matters, several experts will be retained to support each of their respective positions.

Thus, each respective party needs to be prepared to undergo necessary and costly litigation that will last for several years, before eventually it settles or goes to trial.

Potential Coverage Issues

Once a PRP is implicated, it will inevitably tender its defense to its insurers. The developers and general contractors will also tender their defense to each of their subcontractors, any sub-subcontractors, and their insurers.

Given the relatively high-exposure involved with large-scale construction defect matters, insurers will generally be cautious and hire coverage attorneys to provide critical analyses of their insurance policies against the facts of each case, the identity of their insureds, and the insureds' scope of work. Furthermore, insurers will not lightly accept additional insureds on their policies without clear evidence, such as a written contract requiring additional insured status and/or a valid Certificate of Insurance naming the PRP as an additional insured. Thus, a series of a claims adjusters and coverage attorneys will be added into the mix.

Additionally, PRPs should be aware of any exclusions in their policies. Exclusions make denying coverage relatively easy for insurers because, if an exclusion applies, all coverage could be precluded. For example, the "Earth Movement Exclusion" is a common exclusion in standardized Commercial General Liability policies. The Earth Movement Exclusion generally precludes coverage for loss resulting from "Earth Movement, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide; mudflow; earth sinking, rising or shifting⁷" But, if coverage is denied entirely, the PRPs may have to fund their entire defense and indemnity, unless another insurer accepts their tender. This risk alone suggests that all PRPs should retain their own coverage attorneys if an insurer denies coverage or otherwise "reserves its rights" to potentially deny coverage at a later time.

However, even if an insurer accepts the claims, its liability will likely not exceed its maximum policy limits, which may or may not erode with defense payments. As such, for a large-scale condominium project, such as the Millennium Tower, many insurers will pay out their policy limits in order to satisfy the claims asserted. Such payments may implicate excess insurance, or, if the insurance is limited, the PRP's own funds.

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Conclusion

We hope the above macro-level approach sheds light on what you will face when dealing with large-scale construction defect matters. The key take-away is that it will be expensive and lengthy litigation, where the potential liability ranges from the low thousands to hundreds of millions of dollars, and insurance companies will only add to its complexity.

1. Millennium Tower, <http://skyscraperpage.com/cities/?buildingID=6729>, last visited on January 27, 2017.
2. Millennium Tower in San Francisco is a \$750M sellout, San Francisco Business Times, April 5, 2013, 3:00 AM, <http://www.bizjournals.com/sanfrancisco/print-edition/2013/04/05/millennium-tower-in-san-francisco-is.html>.
3. San Francisco's leaning Millennium Tower seen sinking from space, CBS News, November 28, 2016, 9:40 PM, located at <http://www.cbsnews.com/news/san-franciscos-leaning-millennium-tower-seen-sinking-from-space/>.
4. San Francisco's leaning Millennium Tower seen sinking from space, CBS News, November 28, 2016, 9:40 PM, located at <http://www.cbsnews.com/news/san-franciscos-leaning-millennium-tower-seen-sinking-from-space/> "the Millennium Tower sunk . . . 1.6 to 1.8 inches — over a recent one-year period and almost double that amount — 2.6 to 2.9 inches — over its 17-month observation period.
5. California Today: A View of San Francisco's Leaning Tower From Space, mike McPate, The New York Times, November 30, 2016, located at https://www.nytimes.com/2016/11/30/us/california-today-sentinel-satellites-millennium-tower.html?_r=0.
6. Note, sinking condominiums are not one of first-impression in this country. Colorado is a state well familiar with the concept and incurred ample litigation as a result. The cases and legislation that have unfolded in Colorado provide both beneficial insight and cautionary foresight on how to handle these situations in the legal realm.
7. Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal.4th 747, 751 [as modified (May 5, 2005)] [emphasis added].